Starmasa Resources Sdn Bhd v Shell Malaysia Trading Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1– 22–41 OF 1998
JAMES FOONG J
5 JANUARY 2004

Civil Procedure — Estoppel — Failure to plead — Only causes of action pleaded in pleadings could be entertained by court — Whether defendant had represented, encouraged or induced plaintiff to act to his detriment on basis of an assumption

The plaintiff was the owner of a piece of land. The plaintiff offered to lease a substantial part of the land to the defendant. Meetings and negotiations were held to discuss, inter alia, the usage of land, building a purpose-built facility and the rental amount. The defendant issued letter of intent on 7 August 1996, which the plaintiff acted upon by commencing building the purpose-built facility for the storage of the LPG cylinders. However, on 26 September 1996, the defendant sent another letter of intent to the plaintiff indicating revised terms and conditions and rental amount. The heading of this letter was specific and only referred to 'Warehouse facilities for Shell packed lubricant products'. It did not mention LPG or facilities to cater for other needs. The plaintiff was not agreeable to the new proposed sum and brought this suit in the High Court praying for estoppel.

Held, dismissing the plaintiff's claim with costs:

The learned judge propounded the law on estoppel and went on to examine the facts that transpired between the parties. The learned judge found that this was a typical case of one party being too eager and over enthusiastic to proceed with a perceived opportunity when such perceived opportunity by all indications is not what it is. From the correspondences and the conduct of the parties, it was clear that the alleged representation or encouragement or inducement by the defendant does not exist. The defendant had at all material times never created any assumption to the plaintiff. Therefore, it was not equitable for the High Court to force upon the defendant what was never assumed, nor implied to be assumed (see para 38).

[**Bahasa Malaysia summary**

Plaintif adalah tuanpunya sebidang tanah. Plaintif telah ditawarkan untuk memajak sebahagian besar tanah tersebut kepada defendan. Pertemuan dan perbincangan telah diadakan untuk membincangkan, antara lain, penggunaan tanah tersebut, membangunkan kemudahan serbaguna dan jumlah sewa. Defendan telah mengeluarkan surat niat pada 7 Ogos 1996, yang mana plaintif kemudian telah bertindak dengan memulakan pembinaan kemudahan serbaguna untuk simpanan silinder LPG. Walau bagaimanapun, pada 26 September 1996, defendan telah menghantar satu lagi surat niat kepada plaintif menyatakan terma-terma dan syarat-syarat dan jumlah sewa yang disemak. Tajuk surat ini adalah spesifik dan hanya merujuk kepada 'Warehouse facilities for Shell packed lubricant products'. Ia tidak menyebut LPG atau kemudahan-kemudahan

disediakan untuk memenuhi keperluan lain. Plaintif tidak bersetuju dengan jumlah baru yang dicadangkan dan memulakan guaman ini di Mahkamah Tinggi memohon estopel.

Diputuskan, menolak tuntutan plaintif dengan kos:

Hakim yang arif telah membangkitkan undang-undang estopel dan seterusnya meneliti fakta-fakta yang timbul antara pihak-pihak. Hakim yang arif mendapati bahawa ini adalah kes biasa di mana satu pihak terlalu ghairah untuk memulakan dengan satu peluang yang dilihat walaupun peluang sedemikian tidak seperti disangkakan. Berdasarkan hubungan dan perbuatan pihak-pihak, ia adalah jelas bahawa representasi atau penggalak atau dorongan yang dikatakan oleh defendan tidak wujud. Defendan telah pada setiap masa matan tidak pernah mengadakan apa-apa andaian kepada plaintif. Oleh itu, ia tidaklah saksama untuk Mahkamah Tinggi mendesak defendan apa yang tidak pernah diandaikan, maupun diandaikan secara tersirat (lihat perenggan 38).]

Notes

For cases on failure to plead for estoppel, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2191.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577 (refd)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615 (refd)
Attorney-General of Hong Kong and Another v Humphreys Estate (Queen's Gardens) Ltd [1987] 1 AC 114 (refd)
Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Waltons Stores (Interstate) Ltd v Maher And Another (1987–1988) 164 CLR 387 (refd)
Yew Wan Leong v Lai Kok Chye.[1990] 2 MLJ 152 (refd)

Sukhdev Singh Randhawa (Azlan Shah Sukhdev & Co) for the plaintiff.
Robert Lazar (Lai Wai Fong with him) (Shearn Delamore & Co) for the defendant.

James Foong J:

Brief history

[1] The plaintiff is private limited company. Its principal shareholder is one Alias Ismail ('PW1') who owns 99.9% of its entire paid up shares. PW1 was also, at one time, in the senior management of the defendant, and after almost 20 years of service with the defendant he retired in 1995.

[2] The plaintiff owns a piece of industrial property in Penang known as Lot 7732, Mukim14, District Seberang Perai Tengah ('the plaintiff's land'). It is about 5.6 acres. Initially, the plaintiff intended to construct three

warehouses thereon. One to be used by the plaintiff for production of extruded plastic products, and the rest for rental. However, this intention changed in 1995 when news was received that the defendant, who owned a depot in Penang, was required to relocate since there was a potential purchaser for its land.

[3] This depot or terminal of the defendant, located in Bagan Dalam, Penang, was used by the defendant to store its packed lubricants and Liquefied Petroleum Gas ('LPG') cylinders. The latter are home use cylinder gas with the slightly taller ones for commercial purpose.

[4] Realizing the potential of renting an alternative depot for the defendant on the plaintiff's land, PW1 had a discussion with one Ariffin Khalid, the operational manager of the defendant. In this position, Ariffin Khalid was responsible for the defendant's distribution activities in the whole of Malaysia, including operating depots, building new ones or closing them.

[5] After a physical site inspection, according to PW1, Ariffin Khalid was amiable to a proposal that a portion of the plaintiffs land be used as a replacement depot for the defendant. The balance of the land can still be utilized by the plaintiff for its proposed factory. Continuing, PW1 elaborated that a site planof the plaintiff's land, stored in a diskette, was handed over to the defendant. Except for the site marked out for plaintiffs proposed factory, the rest of the area on the plan was blank. When this diskette was returned it contained drawings for a proposed purpose built facility for storage of packed lubricants, LPG, and future storage warehouses. To make the site plan more comprehensive, the plaintiff's consultant engineer visited the defendant's Nilai depot to study the defendant's requirements. Particular emphasis were placed on the defendant's standard Health, Safety & Environment guidelines.

[6] Receiving favorable indication from Ariffin Khalid that renting such purpose built facility from the plaintiff is more economical in terms of time and money to the defendant's constructing its own, the plaintiff applied to the Majlis Perbandaran Seberang Prai in June 1996 for building approval based on the site plan prepared by the plaintiffs consultant that incorporates features required by the defendant. Basically this consist of:

(a) two future drum storage yards;

(b) one cylinder storage shed;

(c) one water tank and a pump room;

(d) one drum storage yard; and

(e) one warehouse with office at the front.

[7] On the far side of all these is the plaintiff's own proposed factory.

[8] On 10 August 1996, building approval was obtained from the authorities. Such news was duly conveyed to the defendant similai to that when the plaintiff applied for approval.

[9] In need of securing some form of commitment from the defendant in writing, the plaintiff wrote to the defendant on 7 August 1996 requesting for

a letter of intent 'where Shell requires us to provide the facilities fit for purpose and in return Shell enters into a long term lease agreement for the use of the facilities'. A meeting with the defendant followed where PW1 claims that defendant wanted the facility by January 1997. Soon on 28 August 1996 the plaintiff by letter informed the defendant that the proposed rental for the facility would be RM160,000 per month with an additional sum of RM70,000 per month for management of the same.

[10] No written reply was received from the defendant regarding this offer. Instead another meeting was held on 3 September 1996 between plaintiff and the defendant. A letter of the defendant's dated 4 September 1996 recorded what transpired. It appears that the defendant requires to 'review' its LPG storage facility on the plaintiff's land. If one examines the site plan, the LPG storage facility takes up a substantial part of the purpose built facility. However despite of this doubt, the plaintiff declares that 'As you have already confirmed that you would like to proceed with the packed lubricant warehouse regardless of the status of the LPG facility, we would be grateful if you could issue us with a letter of intent to award the contract to build and operate the packed lubricants warehouse (at the fees mentioned above subject to final negotiations), with an option to do the same for the LPG cylinder storage shed in the event you decide to proceed with such facility'.

[11] On 26 September 1996, the defendant corresponded with the plaintiff for the first time. It issued a letter of intent to the plaintiff. This letter bears the heading, 'Letter of Intent: Warehouse facilities for Shell packed lubricant products at Seberang Perai'. It then announces, 'We are pleased to confirm our intention to lease the above facilities ... subject to the following terms'. The relevant terms are:

1 Lease period is for five years with option to renew for a further five years with effective date targeted at 1 March 1997.

2 Rental 'As indicated in your letter to us dated 4 September 1996, we are prepared to consider your rental fee proposed of RM80,000 per month subject to further negotiations'.

3 'Usage: The facility shall be used for the storage of lubricants'.

4 Manning/Labour Services: It is our intention to contract out the labour services to you as well The supervisory and administration will be carried out by our own personnel. Details to be discussed futher'.

5 'With regards to storage for LPG in cylinders, we would like to have the proposal pursued at a later stage'.

[12] This letter then ends with, 'We trust that you are convinced of our serious intention to proceed with the proposal. In view thereof, we wish to propose a meeting be convened soon to start discussion on the above with the view to finalizing the agreements by end November 1996.'

[13] The signatory of this letter is Ariffin Khalid.

[14] After receiving this letter, the plaintiff on 24 November 1996 proceeded to appoint contractors to construct the purpose-built facility according to the plan as approved by the authorities.

[15] On 29 November 1996, one Haron Johah replaced Ariffin Khalid. There was an internal inquiry in the defendant over the limit of authority for the defendant's personnel. By January 1997, the plaintiff was informed of a meeting to be held at Shell House, Kuala Lumpur. This time, the defendant's finance manager is to head the defendant's negotiation team. By now the construction on the facility was 80% completed. Anxious that the original form of arrangement be maintained, the plaintiff wrote to the defendant on 17 February 1997 expressing: 'The Letter of Intent issued by Shell to Starmasa indicates that an agreement should have been concluded in November 1996' and urged the terms of the lease be finalized in view of the handing over of the facility by 1 May 1997.

[16] On 4 March 1997, the defendant's property manager, one Azman Ismail responded in writing to say that the defendant would be visiting the plaintiff's land and the defendant is in the course of 'undertaking a benchmaking study to determine market reflective terms for both parties' This as interpreted by PW1, means: 'they want to know the market rate'.

[17] Soon the proposed site visit was undertaken by the defendant and after requesting for particulars on the cost of construction, all of which was provided by the plaintiff, the defendant came back with the following pertinent comments in their letter dated 28 March 1997:

> We also wish to express our concern that the LPG cylinder Storage Shed was constructed even though we have not confirmed on its requirement.
>
> As per our letter of intent dated 26 September 1996, we have confirmed our intention for storage of lubricant products subject to a satisfactory conclusion on the terms and conditions of agreement including monthly rental of the lubricant products warehouse.

[18] After another meeting at Shell House between the parties, the defendant by letter dated 1 April 1997 sets out the following:

1 We confirm our requirement for packed lubricant products ...

2 We confirm that we do not wish to pursue the LPG STORAGE FACILITIES nor THE FUTURE DRUM STORAGE YARD as shown on the layout plan dated 8 August 1996 attached to the letter of intent of 26 September 1996. We also have no future intention of utilizing the facilities.

3 Therefore the packed lubricant facilities shall be stand-alone basis with adequate access and security features incorporated. Based on the above premises, we have made an offer to you for at a monthly rental of RM9, 220.

[19] The plaintiff protested to this offer in its reply of 4 April 1997. And on 15 April 1997, still attempting to salvage the deal, the plaintiff reduced its rental offer for the entire purpose-built facility at RM138,540 per month for ten years or RM124,130 per month for 15 years. After some further negotiations at other alternatives like, perhaps calculating the rental for the LPG storage on a per cylinder basis, the plaintiff finally settled at an offer

to rent the entire purpose built facility for RM105,000 per month. This was not accepted. Instead the defendant insisted on a rental of RM20,214.98 per month for the office, warehouse and drum storage yard. The plaintiff rejected this; thus this civil suit.

Plaintiff's claim

[20] The plaintiff's statement of claim alluded that the plaintiff on the 'false representation', 'inducement', 'encouragement' of the defendant and by the defendant's 'conduct persisted in their representation' which 'promoted trust and confidence of the plaintiff' to build the purpose-built facility now 'resile from its earlier representations' And, if not for the defendant's 'avowed intention to take a lease fot the purpose-built facilit(y)ies the plaintiff would not have incurred cost, effort and energy' in constructing the same which cannot now be utilized for other purposes than that intended This is followed by a claim for both special and general damages.

Defendant's defence

[21] The defendant's defence is simply this: The defendant only required warehouse for storage of packed lubncants and even for this, the rental is subjected to negotiations. There were no representations or deeds of the kind accused of by the plaintiff to proceed with the construction of the purpose built facility for the defendant. And, if the plaintiff elected to construct such facility then the defendant undertook such project at its own peril. Further, when terms on the rental could not be agreed upon by the plaintiff, despite the same being calculated by an independent valuer, the deal was off.

Causes of action

[22] In the written submissions of the parties, there is a dispute as to the number of causes of action in this plaintiffs claim. For certain, and agreed by all, there is the cause of action based on the equitable principle of estoppel. But what is in dispute is the claim by the defendant that the facts alluded to in the statement of claim also give rise to causes of action on quasi contract and restitution Towards these, defendant protested on the ground that they are not pleaded.

[23] I have carefully examined the relevant paragraphs highlighted by the plaintiff? counsel to support the plaintiffs claim that these were raised, I regret to say that after perusal I am of similar view as the defendant's counsel that these did not support the causes of action for a quasi contract and restitution. In addition, as for the latter there is no alternative prayer in the statement of claim for a reasonable sum for work purportedly done at the defendant's request. From my reading of the plaintiff's pleadings, all points to a claim based on the cause of action of estoppel And in line with the long list of authorities (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 and *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615 just to mention a few) if the issue is not raised in the pleadings then the court shall not entertain it.

Principles to be applied in the cause of action based on the doctrine of estoppel

[24] As a start Lord Denning MR's dictum on the principles of the doctrine of estoppel in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 at p 584 is enlightening:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of law. But it has become overloaded with cases. That is why I have not gone through them all in this nidgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action: estoppel cannot do away with the need for consideration: and so forth. All these can now be seen to merge into one generai principle shorn on limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law. and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[25] This broader approach is adopted by the Privy Council in *Attorney-General of Hong Kong and Another v Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114 at p 123 where it accepted Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 which expressed:

> … whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial — requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

[26] In the Australian High Court case of *Waltons Stores (Interstate) Ltd v Maher And Another* (1987–1988) 164 CLR 387 at p 404 Mason CJ & Wilson J after examining most of the cases on this concept declare:

> One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were ten free to ignore it': per Dixon J in *Grundt*; see also *Thompson*. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.

Issues

[27] By deduction from the above the issue in this case is: whether the defendant had represented, encouraged or induced the plaintiff into an assumption that the defendant would rent the purpose built facility from the plaintiff, and the defendant has reneged on this.

Analysis

[28] With the issue and principles to be applied clearly in mind, I shall now proceed to analyze the facts.

[29] The parties involved in this engagement are commercial entities. One is an arm of a multinational company and the other a locally incorporated establishment. Both are manned by officers well grove in commercial dealings. The correspondence, initially from the plaintiff then rejoined by the defendant proves that these are very prudent businessmen where conversations between them are recorded after a meeting. These correspondences, being contemporaneous evidence, give immense insight as well as the veracity of what had occurred, rather than oral testimony of the parties that could be biased towards the side they are on. For this, the advice by Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 is heeded:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.

[30] To begin, there is no dispute that the defendant was scouting for an alternative site to replace its depot in Bagan Dalam. Also not in contention is the visit by the defendant's personnel led by Ariffin Khalid to the plaintiff's land and the subsequent input by the defendant on the preparation of the site plan which incorporated the purpose-built facility. This can be seen by the plaintiff's consultant gaining access to the defendant's Nilai depot to study the defendant's set-up. But even acceding to PW1's claim that around March/April or May 1996, before the submission of the plan to the approving authorities, Ariffin Khalid had instructed him to proceed with such application the plaintiff incurred no loss at this stage. The same applies to the time when building approval was received from the Majlis Perbandaran Seberang Prai. The crucial period, in my view, for the determination of the issue at hand is when the plaintiff requested from the defendant a letter of intent to commit to the project. This was on 7 August 1996, followed by the proposed rental on 28 August 1996. Though the defendant did not respond to these in writing, a meeting took place on the 3 September 1996. What occurred here is found in the plaintiff's letter of 4 September 1996. It reveals that the defendant required time to review the need of the LPG facility. But the plaintiff interprets this as a consideration on its size not the abandonment of this facility. Further, the plaintiff insists that this did not alter the defendant's attitude and intention to proceed with the taking up of the entire purpose built facility. But all these contradict what is further recorded in the letter of 4September 1996. This letter went on to disclose an indication by Mr Edwin Chia of the LPG section in the defendant that the defendant 'might consider removing the requirement (LPG) altogether'. In fact the plaintiff was not disappointed over this by responding that 'regardless of the LPG facility, we would be grateful if you coukJ issue us with a Letter of Intent to award the contract to build and operate the packed lubricants warehouse (at the fees mentioned above subject to final negotiations), with the option to do the same for an LPG storage shed in the event you decide to proceed with such facility.'

[31] In my view, all these are indications that the defendant at that material time was uncertain over the fate of its LPG operation to be housed on the plaintiff's land. The decision on this matter was finally made on 26 September 1996 in the letter of intent. The heading of this letter is specific. It only refers to 'Warehouse facilities for shell packed lubricant products'. It does not mention LPG or facilities to cater for other needs. Then under item 4 this intention is repeated by under 'Usage: The facilities shall be used for the storage of lubricants.' To fortify this intention further, in the penultimate paragraph of this letter the defendant declares that:

> With regard to storage of LPG in cylinders, we would like to have the proposal pursued at a later stage.

[32] With such clear and unambiguous terms, I fail to comprehend how the plaintiff could perceive the defendant had represented to them, least encouraged or induced to built the purpose built facility for the defendant when what was required was only a warehouse to store the packed lubricants.

[33] It was on the strength of this letter of intent that the plaintiff proceeded to appoint the contractors to construct their project But when the letter of intent never spells out the requirement for the entire uurpose built facility where was the representation or encouragement or inducement by the defendant to the plaintiff to proceed on the assumption accused of?

[34] When questioned as to why such step was taken despite the uncertainty surrounding the LPG requirement. PW1, in his witness's statement (QA114), replied that it was too late to alter the plans and 'if the defendant decided not to take the whole area of the LPG storage, the plaintiff have the rignt to rent the balance part to other tenant or for its own usage'. When this was the objective of the plaintiff, then firstly, the alleged representation or encouragement or inducement by the defendant is no longer true. Secondly, the plaintiff bears the burden of carrying its own load when the defendant decides not to take such premises for its LPG storage.

[35] Then somewhere in November 1996 there was news that Ariffin Khalid was removed and being replaced by a new man. In fact, there was even an internal inquiry going on in the defendant regarding the extent of authority of the defendant's officers. Despite this, the plaintiff went ahead with the construction.

[36] The plaintiff has offered an explanation on the need to hurry. It accuses the defendant of wanting the facility by January 1997. This is denied by the defendant, who discloses that the actual reason behind this is that the plaintiff was in need of its own factory which was built at the same time. This factor is of little significance compared to what the defendant actually represented or encouraged or induced the plaintiff to do. As illustrated, there is just no evidence to link the defendant to the assumption that the defendant was prepared to rent the entire purpose built facility and requested the plaintiff to proceed on such understanding.

[37] Subsequent events, to what I have discussed, center on the defendant's stand that it is not liable to take up the entire facility and the hackling over

the amount of rental for the warehouse for the packed lubricants. From here, there is very little evidence to support the plaintiff's claim for estoppel when each party was defending their respective position. Further, I am of the view that this dispute on rental has little relevance to the plaintiffs claim since the plaintiff insists that the entire purpose built facility must be taken over by the defendant, not part of it. In any event though, the defendant did consider the rental of RM80,000 for only the warehouse for the packed lubricants the same was still 'subject to further negotiations' as mentioned in the letter of intent. This, by itself gives the defendant a right to bargain and if a compromise is not arrived at, then there may be other avenues for the plaintiff to settle this matter. But as stated, the plaintiff in this suit is insisting on renting out the entire facility to the defendant. This rules out the question of the rental to be paid for warehouse to store the packed lubricants.

[38] On the grounds expressed above, I am afraid that the plaintiff cannot succeed. This is a typical case of one party being too eager and over enthusiastic to proceed with a perceived opportunity to make a good killing when such perceived opportunity by all indications is not what it is. The defendant has at all material time never created any assumption to the plaintiff that it will take the entire facility. The defendant has explicitly set out that what was required was the warehouse for the packed lubricants. Despite this, the plaintiff elected to proceed to construct more than necessary. To request this court to force upon the defendant what was never assumed, nor implied to be assumed, to my mind, is definitely inequitable.

Conclusion

[39] Accordingly, I hereby dismiss the plaintiff's claim with cost.

Plaintiff's claim dismissed with costs.

Reported by Rinchen Tee